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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 SAN JOSE DIVISION

19	CLRB HANSON INDUSTRIES, LLC d/b/a)	CASE NO: C05-03649 JW
20	INDUSTRIAL PRINTING, and HOWARD)	
21	STERN, on behalf of themselves and all)	PLAINTIFFS' MEMORANDUM OF
22	others similarly situated,)	POINTS AND AUTHORITIES IN
23	Plaintiffs,)	OPPOSITION TO DEFENDANT'S
24	vs.)	MOTION TO DISMISS PLAINTIFFS'
25	GOOGLE, INC.,)	UNJUST ENRICHMENT CLAIM IN THE
26	Defendant.)	SECOND AMENDED COMPLAINT
27		Date: June 26, 2006
28		Time: 9:00 a.m.
		Place: Courtroom 8
		Judge: Honorable James Ware

Plaintiffs' Opposition to Defendant's Motion to Dismiss Plaintiffs'
Unjust Enrichment Claim in the Second Amended Complaint
Case No: C05-03649 JW

PRELIMINARY STATEMENT

Plaintiffs submit this memorandum in opposition to defendant Google Inc.'s ("Google") motion to dismiss the unjust enrichment claim in the Second Amended Complaint ("SAC").

Plaintiffs amended their pleading in full compliance with this Court's Order Granting Defendant's Motion to Dismiss Plaintiffs' Unjust Enrichment Claim with Leave to Amend, dated April 12, 2006 (the "Order"). Accordingly, Plaintiffs' unjust enrichment claim in the SAC no longer includes allegations that an express contract governs the parties' rights and it alleges, in the alternative, that if an express contract between the parties governing this dispute is found to exist, then such contract is unenforceable as a result of defendant's material misrepresentations.

Ignoring both the law and Plaintiffs' amended allegations, defendant wrongfully argues that the unjust enrichment claim should be dismissed because Plaintiffs do not adequately plead fraud in the procurement of a contract. Admittedly, Plaintiffs do not plead fraud. As clearly explained by this Court - a plaintiff need not allege procurement by fraud unless she repeats and realleges the contract allegations in the unjust enrichment claim, and even then, a plaintiff does not have to allege fraudulent procurement, but may plead that the contract is "unenforceable or ineffective for some other reason." Order, p. 5.

In the SAC, Plaintiffs do not repeat and reallege the contract allegations in the unjust enrichment claim. They are otherwise allowed to plead alternative claims for both breach of contract and unjust enrichment, Order, p.4. The allegations as to the unjust enrichment claim, which this Court has already deemed "sufficient to state a claim for unjust enrichment," Order, p. 5, have not changed. Hence, defendant's motion should be denied in its entirety and adjudication of the merits of all claims should proceed.

1 and, as per a Stipulation entered into between counsel for the parties on or about September 13,
2 2005, Plaintiffs granted Google its request for a 30 day extension, or until October 12, 2005. A
3 couple of days after the stipulation was signed, on or about September 16, 2005, Plaintiff
4 received Google's Notice of Removal of Action to Federal Court which, according to
5 Defendant's affidavit, had been served by mail on September 9, 2005.
6

7 On or about October 12, 2005, Google purportedly served its Motion to Dismiss
8 Plaintiffs' Complaint and supporting documents, via mail. On November 14, 2005, Plaintiffs
9 filed and served their First Amended Complaint ("FAC"). Google again requested additional
10 time to respond to the pleading and Plaintiffs again granted Google's request. On November 22,
11 2005, the parties stipulated that any answer to the FAC was to be filed and served by December 16,
12 2005, and that any responsive motion was to be filed and served by January 3, 2006. The parties
13 further agreed to meet and confer in December 2005 and to file their Joint Case Management
14 Statement on or before January 9, 2006, in accordance with the Court's Case Management Order
15 dated September 12, 2005. By December 22, 2005, Google stated that it would be filing a
16 motion to dismiss. The parties stipulated to adjourn the then January 9, 2006 Joint Case
17 Management Statement deadline to April 21, 2006, and the January 23, 2006 Case Management
18 Conference to May 1, 2006.
19

20 On January 3, 2006, Google filed its Motion to Dismiss Plaintiffs' Unjust Enrichment
21 Claim returnable March 6, 2006. (Had Plaintiffs been advised that defendant's motion would be
22 directed at only one claim, they would not have agreed to adjourn the CMC for more than three
23 months.) Plaintiffs submitted their Memorandum of Points and Authorities in Opposition to
24 Defendant's Motion to Dismiss Unjust Enrichment Claim on February 2, 2006.
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1 On January 31, 2006, the Court *sua sponte* adjourned the return date of defendant's
2 motion to March 13, 2006. Plaintiffs' counsel was unable to appear on that date and the next
3 date agreeable to both counsel and the Court was April 3, 2006. Thereafter, the parties
4 stipulated, and the Court ordered, that both the hearing on defendant's motion and the initial
5 Case Management Conference be held on April 3, 2006.
6

7 On or about March 9, 2006, the parties, unable to select an ADR process, submitted a
8 Notice of Need for ADR Phone Conference. Pursuant to a call held on March 29, 2006, the
9 parties decided that mediation would be the most advantageous process, when appropriate. The
10 parties submitted a list of five mediators on May 3, 2006.
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12 On March 20, 2006, defendant filed their reply papers in further support of their motion
13 to dismiss the unjust enrichment claim.
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15 On March 23, 2006, the parties submitted their Joint Case Management Statement and on
16 or about March 29, 2006, the parties exchanged their initial disclosures.
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18 On or about March 30, 2006, the Court advised the parties that it would not have a
19 hearing on defendant's motion to dismiss, and subsequently advised counsel that the Initial Case
20 Management Conference scheduled for April 3, 2006 would be adjourned until June 26, 2006.
21

22 On April 12, 2006, the Court dismissed Plaintiffs' unjust enrichment claim as pled in the
23 FAC and granted Plaintiffs leave to replead by May 17, 2006 (which left time for Defendant to
24 answer the amended pleading prior to the initial conference).
25

26 Plaintiffs promptly filed their SAC on May 4, 2006.
27

28 On May 18, 2006, Defendant filed this motion to dismiss the unjust enrichment claim as
amended in the SAC.

Thus, this case was filed nearly one year ago and Defendant has not yet filed a responsive pleading and the Initial Case Management Conference has not yet been held.

ARGUMENT

I. The Standards Of Proof On Defendant's Motion To Dismiss Plaintiffs' Unjust Enrichment Claim

“The [Rule 12(b)(6)] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.” Moulton v. AmeriCredit Financial Services, No. C 04-02485 JW, 2005 U.S. Dist. LEXIS 32185, at *6 (N.D. Cal. June 28, 2005) quoting Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997); Paulsen v. CNF, Inc., 391 F. Supp. 2d 804, 807 (N.D. Cal. 2005). Such a motion must not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Gilligan, 108 F.3d at 248 (citation omitted); Gorman v. Wolpoff & Abramson, LLP, 370 F. Supp. 2d 1005, 1008 (N.D. Cal. 2005). Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is proper only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient facts under a cognizable legal theory. SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 782-83 (9th Cir. 1996); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). A Court should not dismiss any claim for relief unless the plaintiff cannot prove any set of facts in support of the claim that would entitle her to relief. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998).

On a motion to dismiss a complaint for failure to state a claim, all allegations in the complaint are assumed to be true and the complaint is to be liberally construed in favor of the plaintiff. Paulsen, 391 F. Supp. 2d at 807; Star Patrol Enters. v. Saban Entertainment, No. 95-

56534, 1997 U.S. App. LEXIS 29994, at *2 (9th Cir. Oct. 23, 1997) (“Rule 12(b)(6) does not establish a high threshold for pleadings . . . ‘allegations must be liberally construed and taken as true, and all inferences must be drawn in favor of the plaintiff.’”) (citation omitted); Williams v. Vidmar, 367 F. Supp. 2d 1265, 1269 (N.D. Cal. 2005) (“[t]he court ‘must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.’”) (citation omitted). Pursuant to Fed. R. Civ. P. 12(b)(6), dismissal must be denied if, from the pleading’s four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. Keiser v. Lake County Superior Court, No. C05-02310 MJJ, 2005 WL 3370006, at *8 (N.D. Cal. 2005).

II. THE UNJUST ENRICHMENT CLAIM SET FORTH IN THE SAC STATES A VALID CLAIM AND FULLY COMPLIES WITH THE ORDER OF THIS COURT

As clearly stated by the Court, “Plaintiffs’ unjust enrichment claim cannot include allegations that an express contract governs the parties’ rights, unless it also alleges that the express contract was procured by fraud or is otherwise unenforceable or ineffective.” Order, pp. 4-5, and “Plaintiff’s allegations are otherwise sufficient to state a claim for unjust enrichment.” Order, pg. 5. Thus, the Court granted Plaintiffs leave to amend.

A. Plaintiffs’ Claim for Unjust Enrichment in the SAC Does Not Include Allegations That an Express Contract Governs the Parties’ Rights

Count V of Plaintiff’s SAC, setting forth a claim for unjust enrichment, no longer repeats and realleges, nor otherwise includes, any express contract allegations. Thus, there is no longer any internal inconsistency preventing this otherwise valid claim from being sustained. Order, pp. 4-5; Lance Camper Manufacturing Corp. v. Republic Indemnity Co. of America, 44 Cal. App. 4th 194, 203, 51 Cal. Rptr. 2d 622, 628 (1996).

1 In making its motion, Defendant either ignores the Order and Plaintiffs' amended
 2 pleading, or at best, misunderstands that as per both the Order and California law, an unjust
 3 enrichment claim can stand without any allegation as to the unenforceability of the contract,
 4 provided said claim does not reallege an express contract between the parties - which Count V
 5 does not.¹ Given Plaintiffs' correction of their prior pleading error, their unjust enrichment claim
 6 in the SAC is valid and sustainable. "Pursuant to Federal Rule of Civil Procedure 8(e)(2),
 7 Plaintiffs are entitled to plead the alternative claims of breach of contract and unjust enrichment,
 8 despite the inconsistency between those claims." Order, p. 4 (citations omitted). Again, the
 9 allegations as to the elements of unjust enrichment, namely, receipt of a benefit and unjust
 10 retention of the benefit at the expense of another, have already been deemed "sufficient," Order,
 11 p. 5, and they have not changed.

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 15 **B. Plaintiffs Alternatively Allege That If The Parties Are Found to Have**
 16 **Entered Into An Express Contract Said Contract is Unenforceable**

17 Even though Plaintiffs' removal of the contract allegations in its claim for unjust
 18 enrichment, by itself, requires that their unjust enrichment claim be upheld, Plaintiffs
 19 alternatively allege:

20 123. Alternatively, if and to the extent, the parties are found to have entered into an
 21 express contract governing the claims herein, plaintiffs are still entitled to restitution
 22 benefits. Such contract is voidable and otherwise unenforceable given Google's material
 23 misrepresentations that advertisers may pause their ad without being charged for those
 24 days, and that advertisers would not be billed more than their daily budget for those days

25 ¹Plaintiffs have realleged paragraph 19 in Count V of the SAC because it defines
 26 "Agreement" the document through which defendant disseminated, most, but not all, of its
 27 material misrepresentations. The paragraph does not allege that the document constitutes a valid
 28 contract.

1 that their ad runs. The material misrepresentations were, and are, contrary to Google's
2 billing practices.

3 This allegation preserves the unjust enrichment claim if the fact-finder finds an express
4 contract between the parties governing the within dispute.² It also eliminates any possible
5 inconsistency within the unjust enrichment claim by explicitly alleging that any contract is
6 unenforceable by reason of Google's material misrepresentations. See Order, p. 5 (An unjust
7 enrichment claim can be pled even if it incorporates allegations as to an express contract
8 provided it is also alleged that said contract was procured by fraud or is otherwise enforceable or
9 ineffective). As repeated above, Plaintiffs have pled that the contract is unenforceable or
10 voidable by virtue of defendant's material misrepresentations. By definition, a material
11 misrepresentation is a misrepresentation that is "likely to induce a reasonable person to manifest
12 his assent", or is a misrepresentation that "the maker knows [] would be likely to induce the
13 recipient to do so." Restatement (Second) Contracts § 162 (1981) (When a Misrepresentation is
14 Fraudulent or Material). Restatement of the Law, Second. Indeed, judges have found that it is
15 "frequently said, by judges and law writers, [] that every part of a consideration is to be
16 presumed to have had some effect, in inducing the party recipient of the consideration, to enter
17 into the contract.'" Hanley v. Savannah Bank & Trust Co., 68 S.E.2d 581, 582-83 (Ga.1952)
18 (citation omitted). This certainly holds true here, where Google's alleged material
19 misrepresentations concern the essence of the contract, namely, the costs to be borne by the
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26 ²Plaintiffs recognize that they are not entitled to double recovery under both claims.
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1 advertisers, and the allegations are to be liberally construed in favor of Plaintiffs and all
2 inferences are to be drawn in Plaintiffs' favor.

3
4 For the reasons set forth above, Defendant's argument that the unjust enrichment claim in
5 the SAC should be dismissed is meritless. Defendant attempts to require and/or create a fraud
6 claim - "[t]hese purported 'material misrepresentations' are allegations of actual fraud,"
7 Defendant Google, Inc.'s Memorandum of Points and Authorities ("Def.'s Mem."), p. 3 - just to
8 have something to knock down and move against.³ As previously stated, Plaintiffs have not, and
9 need not, allege fraud.
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11 Plaintiffs followed this Court's guidance and in so doing, have now properly pled
12 alternative claims for breach of contract and unjust enrichment.
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24 ³See also Def.'s Mem., p. 3 citing and paraphrasing *Wilkie v. Coinway, Inc.*, 257 Cal.
25 App.2d 126, 136, 64 Cal. Rptr. 845, 852 (1967) which concerned fraudulent, as opposed to
26 material, misrepresentations and which did not even discuss pleading standards. Interestingly,
27 the *Wilkie* Court stated, "[O]ne material false statement is sufficient ground for rescission." 257
28 Cal. App.2d at 138, 64 Cal. Rptr. at 852.

CONCLUSION

For the reasons set forth herein and the allegations in Plaintiffs' Second Amended Complaint, Defendant Google Inc.'s Motion to Dismiss Plaintiffs' Unjust Enrichment Claim in the Second Amended Complaint should be denied in its entirety and this case should proceed to an adjudication on the merits of all claims.

Dated: June 5, 2006

WOLF POPPER LLP

By: /s/ Michele F. Raphael

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